

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, HI

November 18, 2005

Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawaii

REGARDING: Request for Public Hearing and Small Business Impact  
Determination to Amend Title 13, Chapter 222, Hawaii  
Administrative Rules Related to the Definition of the Shoreline  
(Shoreline Certification Rules)

PETITIONER: State of Hawaii Department of Land and Natural Resources

LOCATION: Statewide

**DESCRIPTION OF THE PROPOSED RULE AMENDMENT**

The Department wishes to amend its administrative rules relating to shoreline certifications (**See Exhibit A in Ramseyer Format**). The definition of "shoreline" under the Board of Land and Natural Resources (BLNR's) shoreline certification rules differs from that of the definition under § 205A-1, Hawaii Revised Statutes. Under § 13-222-2, the "shoreline" is:

"The upper reaches of the wash of the waves, other than storm or tidal waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or where there is no vegetation in the immediate vicinity, the upper limit of debris left by the wash of the waves."

The underscored clause is extra language not found in the statute. The terms of the administrative rules could be read to establish a preference for the vegetation line as the presumptive indicator of the shoreline, allowing use of the debris line as the presumptive indicator of the shoreline only "where there is no vegetation in the immediate vicinity."

In situations where the vegetation line lies more mauka of the debris line, this reading would be consistent with the intent of the underlying statute and case law in designating the vegetation line as the presumptive indicator of the shoreline. However, this reading does not account for situations where the debris line extends more mauka than the vegetation line, where the presumption should be that the upper reaches of the wash of the waves lie along the debris line, rather than vegetation that may be present in the immediate vicinity.

The department does not agree with this interpretation of the rule. In fact and in practice, the department and the chairperson presently interpret and apply the rule in a manner consistent with the statute, case law, and constitution. In particular, during the certification process the department and the chairperson do not look solely to the vegetation line but rather look at all relevant evidence in determining the shoreline.

For approximately the last year, at the instruction of the chairperson, the department's SeaGrant representative and an employee of the Land Division make site inspections on "challenging" shoreline determinations (these include North Shore Kauai properties, areas that may be subject to erosion, areas where the shoreline might be in question and areas where a certification is subject to an appeal.) These individuals are instructed to look for all evidence of shoreline and not limit their evaluation to any one indicator.

In addition, the department has entered into a two-year tri-party agreement between DLNR, DAGS and SeaGrant to fund an additional SeaGrant person to be situated in the DLNR offices to assist in shoreline determinations, thereby extending the existing practice of receiving professional assistance in the shoreline certification process.

Because surveyors traditionally relied on vegetation as the primary indicia of the shoreline under the administrative definition of "shoreline", some property owners promoted or "induced" vegetation growth in a seaward direction. This practice led to several problems in the management of shoreline development and public access. First, this allowed structures to be located closer to the active beach in areas subject to erosion hazards and flooding. This led to the construction of shoreline structures (many illegal) to protect these structures from damage. Fletcher documented the effect of shoreline structures on beaches. Studies conducted at the University of Hawaii show that shoreline hardening<sup>1</sup> has resulted in the loss of nearly 25 percent of Oahu's sandy beaches. Beach loss in the State due to hardening of the shoreline is not limited to the island of Oahu. All of the main Hawaiian Islands have seen the loss or narrowing of their sandy beaches due to shoreline hardening. In addition to beach loss, there is a tremendous cost (monetary and emotional) to coastal landowners from damages sustained by erosion damages and flooding.

A second major consequence of improper shoreline delineations is that public beaches become privatized. Cultivation of vegetation onto public beach reduces beach width and is interpreted by public citizens and private landowners alike as the private property line. This squeezes the public into a narrow corridor of lateral access along the shore, or eliminates such access completely. While the view of the vegetation line as a property boundary is technically inaccurate, in reality, the occupation of the beach by vegetation creates a substantial de facto physical and psychological barrier to public use and enjoyment of one of Hawai'i's most important resources.

While there are other consequences related to improper shoreline delineations that could result from the improper interpretation of the administrative rule, such as failure to include important dune features in the Conservation District, the loss or narrowing of beaches and the loss of beach

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<sup>1</sup>Shoreline hardening is the fortification of land to retard coastal erosion. Hardening includes such things as seawalls, revetments, bulkheads, jetties, groins, sand bags, and any hard material used to retard or stop land loss by coastal erosion.

access are two major concerns. Amending the administrative definition of shoreline to be consistent with the statutory definition would reduce any uncertainty over which definition should be read literally, and would help to deemphasize vegetation as the primary indicia of the shoreline, even though the Department no longer relies on the vegetation line as the primary indicia of the shoreline.

An additional reason for making this change to the rule in advance of additional changes that may be necessary or desirable is to resolve a pending lawsuit. This lawsuit challenges the rule as contrary to the underlying statute and case law. Plaintiffs' offer to settle the suit (**Exhibit B**) asks the Board to initiate the amendment process. The proposed amendment would resolve this dispute and remove any doubt or negative light cast by the disputed language over the shoreline certification rules and process.

#### **PROPOSED RULE AMENDMENT AND JUSTIFICATION:**

The Department believes that the definition of "shoreline" in the shoreline certification rules should be amended to match the definition in the underlying statute. Specifically, the proposed amendment would remove the clause "where there is no vegetation in the immediate vicinity" from the rule, thereby making the regulatory and statutory definitions identical. In addition, the word "tidal" would be replaced with "seismic" to make that part consistent. Such amendment would eliminate any discrepancy between the rule and statute, help clarify the shoreline certification rules, and be beneficial in many ways.

#### **STAFF RECOMMENDATION:**

That the Board of Land and Natural Resources (BLNR) approve the Department's request to hold a public hearing in order to change the definition of "shoreline" contained in the administrative rules (§13-222, HAR) to be consistent with the definition of "shoreline" in the statute (§ 205A, HRS), which reads as follows:

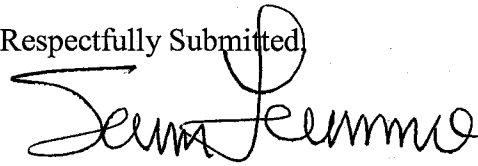
"Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves."

In addition, the Department requests that the BLNR approve the following:

1. Approve the Department's request to process the subject amendment to Chapter 13-222, Hawaii Administrative Rules;
2. Determine that the proposed rule amendment will not impact or affect small business;
3. Authorize the forwarding of a request for public hearings to the Governor, State of Hawaii, on the proposed rule amendment;
4. Upon executive approval, publish public hearing notices; and

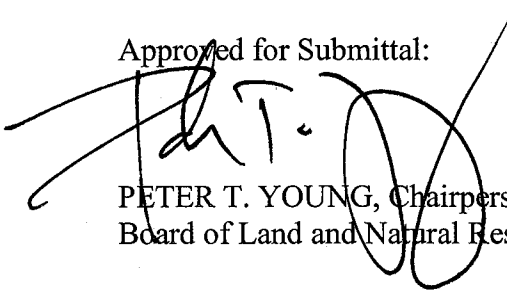
5. Upon executive approval, appoint a representative of the Board of Land and Natural Resources as public hearing master for the proposed rule amendment's public hearings.

Respectfully Submitted,



SAMUEL J. LEMMO, Administrator

Approved for Submittal:



PETER T. YOUNG, Chairperson  
Board of Land and Natural Resources

Rules Amending Title 13  
Hawaii Administrative Rules

1. Section 222-13-2, Hawaii Administrative Rules, is amended by amending the definition of "shoreline" to read:

"Shoreline" means the upper reaches of the wash of the waves, other than storm or seismic [tidal] waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or [where there is no vegetation in the immediate vicinity,] the upper limit of debris left by the wash of the waves."

2. Material, except source notes, to be repealed is bracketed. New material is underscored.

3. Additions to update source notes to reflect these amendments are not underscored.

4. These amendments to Chapter 13-222, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on \_\_\_\_\_, and filed with the Office of the Lieutenant Governor.

\_\_\_\_\_  
Chairperson of Board of Land  
and Natural Resources

APPROVED AS TO FORM

\_\_\_\_\_  
Deputy Attorney General

EXHIBIT A



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII  
JUNEAU, ALASKA NEW ORLEANS, LOUISIANA SAN FRANCISCO, CALIFORNIA  
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.  
ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER  
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

October 7, 2005

VIA HAND DELIVERY

Board of Land and Natural Resources  
State of Hawai'i  
c/o: Bill Wynhoff, Deputy Attorney General  
465 South King Street, Suite 300  
Honolulu, Hawaii 96813

LAND/TRANS. DIV.  
DEPARTMENT OF  
ATTORNEY GENERAL  
2005 OCT -7 A 11:48

Re: PASH v. BLNR, Civ. No. 05-1-1332-07 VSM: Formal Offer of Settlement  
(CONFIDENTIAL)

Aloha Chair Young and Members of the Board:

This letter follows up on ongoing negotiations between Earthjustice, on behalf of Public Access Shoreline Hawai'i and the Sierra Club (together, "citizen groups"), and Chair Young and Deputy Attorney-General Bill Wynhoff, on behalf of the Board of Land and Natural Resources ("Board"), attempting to settle the above-referenced case. We have been encouraged by the progress in these discussions and believe that we are close to reaching agreement. In this spirit, and in the interest of avoiding burdensome litigation and needless controversy, the citizen groups tender this offer of settlement,<sup>1</sup> which we hope the Board will seriously consider and accept.

**Summary of Recent Developments**

On July 25, 2005, Earthjustice filed a complaint in the Circuit Court of the State of Hawai'i seeking a declaratory ruling that the definition of "shoreline" in the state shoreline certification rules, Haw. Admin. R. § 13-222-2, is inconsistent with the established definition in the Coastal Zone Management Act (CZMA), Haw. Rev. Stat. ch 205A, and the precedent of the Hawai'i Supreme Court. A copy of the complaint is attached as Exhibit "A."

The complaint explains that the underlying statute and case law establish the shoreline at the "upper annual reaches of the wash of the waves," "evidenced by the edge of

<sup>1</sup> We note that the Hawai'i Rule of Professional Conduct (HRPC) require the Board to be informed of any "written offer of settlement in a civil controversy" and gives the Board the final authority to accept this offer. See HRPC 1.4, 1.2(a).

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vegetation or by the line of debris left by the wash of the waves," with the underlying public policy of "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." See Haw. Rev. Stat. 205A-1; In re Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) (emphasis added); County of Hawai'i v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973); In re Sanborn, 57 Haw. 585, 589, 562 P.2d 771, 774 (1977). The administrative rule adopted by a previous Board in 1988, however, expresses a blanket preference for the vegetation line over the debris line by stating that the shoreline is "usually evidenced by the edge of vegetation growth, or where there is no vegetation in the immediate vicinity, the upper limit of debris." Haw. Admin. R. § 13-222-2 (emphasis added). In cases where the waves push debris mauka of the vegetation line, this regulatory preference for the vegetation line produces the backward result of diminishing public beaches and people's use and access of them. The administrative rule allows development too close to the ocean, which encroaches on public beach space and exacerbates beach erosion and loss. It also encourages abuse by landowners who seek to extend the vegetation line further makai. The beach ecosystem and public shoreline uses, access, and safety suffer as a result.

Soon after filing suit, we contacted Mr. Wynhoff to explore the possibility of settling this case. One week later, we personally met with Mr. Wynhoff and Chair Young. Through these discussions, everyone recognized that we shared common understandings of the basic principles of Hawai'i's shoreline law, and that settlement was not only genuinely possible, but also preferable to all.<sup>2</sup> At this meeting, we agreed that Earthjustice would draft proposed settlement language. We submitted this proposal several weeks ago, and Mr. Wynhoff responded with a revised draft containing red-lined changes. The red-lined document is attached hereto as Exhibit "B." After further conversations with Mr. Wynhoff and consultation with our clients, we are submitting this letter with a formal offer of settlement.

### Offer of Settlement

We are pleased that the state and our clients share a common view of the underlying case law and statute, which are set forth in the first part of the revised draft. See Exh. B ¶¶ 1-5. We are willing to accept the general summary of these principles, as revised by Mr. Wynhoff. We are also encouraged by the many efforts Chair Young has made in recent months to improve the shoreline certification system. We are open to including language similar to paragraphs 11 to 12 of the revised draft recognizing these important steps.

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<sup>2</sup> Such convergence of views and interests should not be surprising, since settled Hawai'i law establishes shoreline resources as a "public trust," which the state has a duty as "trustee" to protect for access and use of the trust's public "beneficiaries," whose interests the citizen groups also seek to protect. See County of Hawai'i v. Sotomura, 55 Haw. 176, 183-84, 517 P.2d 57, 62.

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Review of the revised proposal indicates we are very close to an agreement. Indeed, it appears that only a single outstanding point remains: the propriety of the Board agreeing to change the definition of "shoreline" in § 13-222-2 of its rules to conform with the underlying laws.

Based on our discussions with Mr. Wynhoff, we have gathered that the state believes it unusual or difficult to change a rule. As further detailed below, we are unclear why this is so. After due reflection, the citizen groups have concluded that, given the agreement on the principles of the underlying laws, the rule, at best, creates uncertainties regarding the definition of the shoreline, and at worst, misstates the law. In order to avoid potential confusion and counterproductive results, we believe that the settlement must include a commitment from the Board, at minimum, to withdraw or change the present definition in the rule.

The revised proposal offers that the state will keep the regulatory definition, but will simply not interpret it contrary to the underlying laws. See Exh. B ¶ 13. This is inadequate for several reasons.

First, the shoreline working group formed by legislative mandate to discuss a wide range of shoreline issues is prepared to recommend a change of the regulatory definition. The latest draft final report of the working group is attached hereto as Exhibit "C." This report recognizes that the definition in § 13-222-2 "reduces interpretation by clearly establishing the vegetation line as the preferred position for the shoreline, and relegates the debris line as a secondary proxy." Id. at 6 (emphasis added). "This has four negative consequences": (1) allowing construction to creep into erosion hazard zones, leading to construction of sea walls and beach loss; (2) narrowing beach width and squeezing the public into a narrow corridor of access, or eliminating access completely; (3) converting land that should be managed under the conservation zone to land managed by county zoning; and (4) encouraging unnatural vegetative armoring, leading to beach narrowing and erosion. It also creates "two additional problems": (1) notwithstanding that certification does not denote ownership, vegetation growth limits public access "in reality"; and (2) in practice, surveyors use the same standards to determine title, so "the problem of artificial vegetation growth does lead to true legal public land loss and reduction of legal public access." Id. at 6-7.

Based on these negative effects of the rule, the draft final report recommends changes in the definitions of the shoreline. Id. at 9. The changes to the regulatory definition would remove the preference for the vegetation line, precisely as the citizen groups requested here. Thus, the larger community involved in shoreline issues does not believe that the current rule should be retained. Notably, the need to change the rule is one of the few points on which the working group could fully agree).

Second, although the state may believe that the regulatory definition is susceptible to various interpretations in its discretion, others flatly disagree. This includes those in the



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working group, as described above, but also others with interests divergent from the state's who are inclined to challenge the state's view. For example, private landowners insist that the rule's plain terms rule removes any state discretion to certify shoreline along debris lines more mauka of vegetation lines. Attached hereto as Exhibit "D" is the relevant portion of a recent appeal filed by a landowner on the north shore of Kaua'i arguing this precise point. In the landowner's words:

§ 13-222-2, HAR, mandates that the vegetation, and not the line of debris, be used unless there is no vegetation in the immediate area. If the Department should desire to amend its rules and regulations, it must do so in accordance [with] Chapter 91 of the Hawaii Revised Statutes. The failure to follow currently adopted rules and regulations is erroneous.

*Id.* at 4 (emphasis added). Thus, even if the state promised to interpret the rule in accordance the underlying laws, this would not fully resolve the problems identified in our lawsuit. The rule would continue to foster misunderstanding and uncertainty and, even worse, would provide litigants with legal authority to insist that the state interpret the rule as written, and to attempt to compel that result in court. Either outcome would compromise the clarity and effectiveness of the shoreline certification system, contrary to the state's duties as trustee over Hawai'i's shoreline resources.

Finally, although the rationale for the resistance to withdrawing or changing the rule remains unclear, we reiterate that no legal barrier exists to such action. While it is settled that agencies cannot invalidate their enabling statutes, see, e.g., Aetna Life Ins. Co. v. Park, 5 Haw. App. 115, 118, 678 P.2d 1101, 1103 (1984) (agreeing with the "overwhelming majority" of holdings that an agency cannot pass on the constitutionality of its governing statute), no such restriction applies to a rule enacted by the agency itself. Indeed, Haw. Rev. Stat. § 205A-42 expressly grants the Board the authority to promulgate rules. We fully recognize that the Board must follow the legally mandated procedures for changing the rule. Moreover, we would never purport to dictate the terms any new rule. All the citizen groups ask is that the Board commit to withdrawing or changing the present rule.

In sum, the citizen groups urge the Board to commit to withdrawing or changing the rule, in order to avoid further problems and litigation and to obviate the need for the state to "interpret" what most people, spanning a wide array of interests, consider a plainly worded rule.

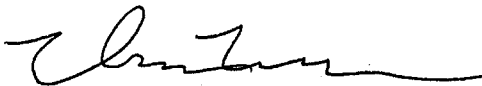
If we are unable to reach agreement on this outstanding point, we are prepared to submit this dispute to the court for resolution. For all the reasons stated above, however, insisting on keeping § 13-222-2 does not serve anyone's best interests. Rather, it will only exacerbate controversy in an area where the state and the citizen groups should share -- and have already established -- common ground. We sincerely hope

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that the Board will agree to settle this lawsuit in the best interests of our precious shoreline resources and the people of Hawai'i that depend upon them.

Please do not hesitate contact us if you have any questions or need further information.  
Mahalo nui for your consideration of this important matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Isaac Moriwake', written over a horizontal line.

Isaac Moriwake  
Kapua Sproat  
EARTHJUSTICE

PAUL H. ACHITOFF #5279  
ISAAC H. MORIWAKE #7141  
D. KAPUA'ALA SPROAT #7182  
EARTHJUSTICE  
223 South King Street, Suite 400  
Honolulu, Hawai'i 96813  
Telephone No.: (808) 599-2436

Attorneys for Plaintiffs

FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2005 JUL 25 AM 11:16

H. CHING  
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

PUBLIC ACCESS SHORELINE HAWAII )	
and SIERRA CLUB, HAWAII CHAPTER, )	Civil No. 05-1-1332-07 V S M
Plaintiffs, )	(DECLARATORY JUDGMENT)
v. )	COMPLAINT; SUMMONS
BOARD OF LAND AND NATURAL )	
RESOURCES, STATE OF HAWAII; )	
PETER YOUNG, in his official capacity as )	
CHAIRPERSON OF THE BOARD OF )	
LAND AND NATURAL RESOURCES, )	
STATE OF HAWAII, )	
Defendants. )	

COMPLAINT

Plaintiffs PUBLIC ACCESS SHORELINE HAWAII ("PASH") AND  
SIERRA CLUB, HAWAII CHAPTER ("SIERRA CLUB") (together, "plaintiffs"), by and  
through its counsel Earthjustice, complain of defendants BOARD OF LAND AND  
NATURAL RESOURCES, STATE OF HAWAII ("BLNR") and PETER YOUNG, in his

EXHIBIT

A

official capacity as CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII (together, "defendants") as follows:

## I. INTRODUCTION

By this complaint, plaintiffs PASH and SIERRA CLUB seek a judicial declaration invalidating in part the definition of "shoreline" contained in § 13-222-2 of the administrative rules adopted by defendant BLNR, to the extent that it conflicts with the long-standing definition of the shoreline under the precedent of the Hawai'i Supreme Court, the constitutional public trust doctrine, and the underlying shoreline protection statute, Haw. Rev. Stat. ch. 205A. In a line of seminal decisions, the supreme court defined the boundary of the shoreline and the public trust in coastal lands as "the upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves," in keeping with the public policy of "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." In re Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968); County of Hawai'i v. Sotomura, 55 Haw. 176, 181-82, 517 P.2d 57, 61 (1973). The legislature has adopted this definition verbatim in the comprehensive Coastal Zone Management Act ("CZMA"), Haw. Rev. Stat. ch. 205A, which regulates coastal development via shoreline setbacks and other controls, and has made clear its intent to follow the court's precedent.

The administrative rules adopted by the BLNR, however, add extra language not contained in any of these definitions, establishing a blanket preference for the vegetation line and allowing consideration of the debris line only "where there is no vegetation in the immediate vicinity." Haw. Admin. R. § 13-222-2. This blanket

preference for the vegetation line contradicts the letter and purpose of the underlying shoreline laws and creates the backwards and harmful result of weakening shoreline protection and diminishing public uses and access where the debris line extends mauka (inland) of the vegetation line. Plaintiffs thus bring this action to obtain a judicial declaration holding the definition of "shoreline" under the BLNR's rules invalid to the extent that it establishes a preference for the vegetation line over the debris line where the debris line extends mauka of the vegetation line.

## II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over the claims for relief in this action pursuant to Haw. Rev. Stat. § 603-21.5(a)(3) (civil actions and proceedings), and Haw. Rev. Stat. 91-7 (declaratory judgment on validity of rules).

2. Venue lies properly in this judicial circuit under Haw. Rev. Stat. § 603-36(5) because the claims in this action arose in this circuit and the defendants are domiciled in this circuit.

## III. PARTIES

3. Plaintiff PUBLIC ACCESS SHORELINE HAWAII is a non-profit organization incorporated under the laws of the State of Hawai'i. As its name indicates, PASH's organizational mission is to safeguard the continued existence and integrity of, and public access to, the shoreline waters, lands, and natural resources of Hawai'i. To this end, PASH and its members have for years devoted particular attention and effort to defending the public interests and policies underlying the shoreline certification

process. They have actively monitored notices of proposed shoreline certifications, examined individual certification applications and proposals via site inspections, and worked with state officials and private landowners to correct improperly located shoreline boundaries. They have also participated in legal proceedings contesting improper shoreline certifications, in which they were admitted as parties with standing and submitted testimony as kama`āina (local resident) witnesses. On a broader level, they have also participated in official working groups formed to review the existing shoreline laws, proposed and helped draft legislation, testified and lobbied at the legislature, and campaigned to raise public awareness of and support for needed reforms. Through these activities, PASH and its members are widely recognized as leading public interest advocates in Hawai`i on shoreline matters in general and shoreline certifications in particular.

4. PASH members live throughout the Hawaiian Islands and regularly access and use beaches and other shoreline resources in their communities for a variety of purposes, including but not limited to fishing, gathering, and beachcombing, recreation such as swimming, diving, surfing, and jogging, and aesthetic enjoyment. PASH members also include Native Hawaiians who have constitutionally protected traditional and customary rights of access and gathering in shoreline areas for purposes such as subsistence and cultural and religious practices. Based on the interests of its Native Hawaiian members, PASH was specifically recognized in the landmark Hawai`i Supreme Court case bearing its name, Public Access Shoreline Hawaii v. Hawai`i County Planning Comm'n, 79 Haw. 425, 903 P.2d 1246 (1995), to have standing to

participate in a contested case on a shoreline management area permit application for a proposed shoreline development.

5. Plaintiff SIERRA CLUB, HAWAII CHAPTER is the Hawai'i branch of the Sierra Club, a national non-profit corporation registered to do business in Hawai'i. The Sierra Club is dedicated to protecting and conserving, through the legal and political process, the nation's lands, waters, wildlife, and natural resources, including those in the Hawaiian Islands. The Sierra Club has over 750,000 members nationwide and over 5,000 members living throughout the State of Hawai'i.

6. For years, the Sierra Club has made protecting shoreline resources and public access thereto one of its top priorities in Hawai'i. For example, the Sierra Club has conducted two major campaigns, the "Mālama Kahakai" (Protect the Beach) and "Blue Water" Campaigns, specifically seeking to protect beaches and shoreline resources. As with PASH, the Sierra Club and its members actively engage in a wide range of activities relating to shoreline certifications, from monitoring and contesting individual cases, to testifying, lobbying, and campaigning in support of law and policy reforms. Members of the Sierra Club have been admitted as parties with standing in contested cases on shoreline certifications, and the Sierra Club has repeatedly been invited to participate in official shoreline working groups as a recognized stakeholder organization.

7. Members of the Sierra Club regularly use and access beaches and other shoreline resources in their communities throughout the state for a multitude of purposes, including but not limited to recreational uses such as walking, swimming,

bathing, snorkeling, surfing, and other sports; fishing and gathering; aesthetic enjoyment; artistic pursuits such as drawing, painting, and photography; education and scientific study; and Native Hawaiian traditional, cultural, and religious practices. They have definite interests in the protection of public beach resources and access and, as stated above, have actively sought to defend these interests in the shoreline certification process.

8. The interests of PASH and Sierra Club and their members have been, and will continue to be, adversely affected by the invalid regulation complained of herein. As detailed more fully below, in mandating a blanket preference for the vegetation line over the debris line whenever vegetation is present, the rule by its terms not only allows, but requires defendants to disregard the debris lines located more mauka of vegetation lines. This creates the counterproductive result of minimizing protection of shoreline resources, exacerbating beach erosion and loss, increasing hazards to public health and safety, and reducing public access. The interests of PASH and Sierra Club and their members in accessing, using, enjoying the beach resources of their communities and protecting these resources and uses via the shoreline certification process have suffered, and will continue to suffer, injury as a result.

9. Defendant BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, is the governing body of the state Department of Land and Natural Resources and is charged with the protection and management of state lands, including lands makai (seaward) of the shoreline. The BLNR's responsibilities include the promulgation of administrative rules governing the certification of the shoreline.



Defendant PETER YOUNG is the Chairperson of the BLNR and is named herein in his official capacity. The administrative rules grant either the BLNR or its Chairperson the authority to render decisions in the shoreline certification process.

#### IV. LEGAL FRAMEWORK: LAW OF THE SHORELINE IN HAWAII

##### A. HAWAII SUPREME COURT PRECEDENT

10. In the 1960s and 1970s, the Hawai'i Supreme Court, led by Chief Justice William S. Richardson, issued a series of historic and visionary cases establishing the law regarding the location of shorelines in Hawai'i. These cases afforded broad recognition and protection of shoreline areas and public beach access and still stand as among the most distinguished legacies of the court to the law and people of Hawai'i.

11. In In re Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968), the court ruled the term "ma ke kai" (along the sea) in royal land patents established the boundary of the shoreline according to the following terms: "along the upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves." The court rejected an alternate interpretation of "mean high water," which would have located the shoreline more makai and would have left the shoreline under water much of the time. Id. at 314-15, 17 & n.4, 440 P.2d at 77-78 & n.4.

12. In County of Hawai'i v. Sotomura, 55 Haw. 176, 181-82, 517 P.2d 57, 61 (1973), the court recognized its Ashford decision as "a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right." The court emphasized that "[p]ublic policy, as interpreted by this court, favors extending to public use and ownership as much of

Hawaii's shoreline as is reasonably possible." Id. at 182, 517 P.2d at 61-62 (emphasis added).

13. The court in Sotomura held that the circuit court correctly determined the shoreline to lie along "the upper reach of the wash of the waves," pursuant to Ashford. Id. However, the circuit court erred in locating the shoreline at the debris line, which lay more makai of the vegetation line. The supreme court held "as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka, the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth."

Sotomura, 55 Haw. at 182, 517 P.2d at 62.

14. The court further recognized that "[l]and below the high water mark, like flowing water, is a natural resource owned by the state 'subject to, but in some sense in trust for' the enjoyment of certain public rights" — a concept commonly known as the "public trust doctrine." Id. at 183-84, 517 P.2d at 63. The court explained that it had long recognized the public trust doctrine and reaffirmed the doctrine's foundational principle that the land below the shoreline "belongs to the State of Hawai'i." Id. at 184, 517 P.2d at 63.

15. In In re Sanborn, 57 Haw. 585, 589, 562 P.2d 771, 774 (1977), the court reiterated that "[t]he law of general application in Hawaii is that the beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves." The court approved the lower court's designation of the shoreline at the "vegetation and debris line," which marked "the 'upper reaches of the wash of waves'

during ordinary high tide during the winter season, when the waves are further mauka (or inland) than the highest wash of waves during the summer season.” Id. at 588, 562 P.2d at 774.

16. The court in Sanborn also reaffirmed that “land below [the] high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes.” Id. at 593-94, 562 P.2d at 776. Thus, the court observed, the public trust doctrine would invalidate any attempt by a private landowner to register land below the shoreline under the state land court statute. Id.

17. The people of Hawai`i have enshrined the public trust doctrine in their state constitution. Article XI, section 1 of the Hawai`i Constitution declares that “all public resources are held in trust by the state for the benefit of its people,” which the Hawai`i Supreme Court ruled “adopt[s] the public trust doctrine as a fundamental principle of constitutional law in Hawai`i.” In re Waiāhole Ditch Combined Contested Case Hearing, 94 Haw. 97, 132, 9 P.3d 409, 444 (2000). The court recognized that the public trust doctrine, among other things, “requires the government of the State to preserve [trust resources] for the use of the public” and imposes “a presumption in favor of public use, access, and enjoyment.” Id. at 136, 142, 9 P.3d 448, 454 (citations omitted).

18. In sum, the seminal shoreline cases of the Hawai`i Supreme Court have established the shoreline “along the upper annual reaches of the wash of the waves, excluding storm and tidal waves,” “usually evidenced by the edge of vegetation or by

the line of debris left by the wash of the waves." These rulings manifest the express public policy of "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible" and the long-recognized principle, now enshrined in the Hawai'i Constitution, that lands below the shoreline are held by the state as a public trust for the people of Hawai'i.

#### B. HAWAII SHORELINE SETBACK STATUTE

19. The Hawai'i State Legislature has adopted and preserved wholesale the Hawai'i Supreme Court's definition of the shoreline. In 1970, the legislature enacted the initial shoreline setback law, recognizing the need to protect the natural shoreline, open space, and public safety from the harms and hazards of development too close to the shoreline. The law provided for establishment of shoreline setback lines at established distances from the shoreline.

20. In enacting the shoreline setback statute, the legislature adopted practically verbatim the definition of "shoreline" established by the supreme court. In its early form, the statute defined "shoreline" as "the upper reaches of the wash of waves, other than storm and tidal waves, usually evidenced by the edge of vegetation growth, or the upper line of debris left by the wash of waves." 1970 Haw. Sess. L. Act 136, § 2 at 255 (codified at Haw. Rev. Stat. § 205-31 (1976)).

21. At no time from the initial enactment of the shoreline setback law through the present has the legislature indicated any intent to modify or depart from the supreme court's definition. On the contrary, the legislative history makes clear the intent to conform the statute's definition to the court's precedent.

22. The shoreline setback law is presently contained in the Coastal Zone Management Act, Haw. Rev. Stat. ch. 205A, which establishes a comprehensive framework regulating coastal development. The Act's definition of "shoreline" continues to mirror the supreme court's rulings, defining "shoreline" as "upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves." Haw. Rev. Stat. § 205A-1.

#### V. BASIS OF THIS ACTION

23. The shoreline setback law mandates the BLNR to adopt rules prescribing procedures for official determinations of the shoreline. *Id.* § 205A-42. Pursuant to this statutory command, the BLNR has enacted Haw. Admin. R. tit. 13, ch. 222, entitled "Shoreline Certifications." The shoreline certifications issued under these administrative rules serve as the foundation for the shoreline setback scheme, providing the reference point upon which the entire setback law relies.

24. The definition of "shoreline" in the BLNR's administrative rules includes extra language not contained in the definition in the underlying statute and case law. The rules define "shoreline" as: "the upper reaches of the wash of the waves, other than storm or tidal waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or where there is no vegetation in the immediate vicinity, the upper limit of debris left by

the wash of the waves." Haw. Admin. R. § 13-222-2 (emphasis of extra language added).

25. By its plain terms, the BLNR's rules allow consideration of the debris line only "where there is no vegetation in the immediate vicinity." *Id.* The rules thus establish a blanket priority favoring the vegetation line over the debris line. This priority under the rules applies whether or not the vegetation line lies mauka of the debris line and whether or not the vegetation line in fact extends more protection to public shoreline resources, uses, and access.

26. The definition of shoreline in the BLNR's rules contradicts the definition in the statute and case law both in language and effect. Whereas the statute and case law mandate consideration of either the vegetation or debris line, in line with the policy of affording the most possible protection to public shoreline resources, uses, and access, the rules mandate consideration of the vegetation line only, to the exclusion of the debris line, whenever vegetation is present.

27. This undue emphasis on vegetation lines mandated by the BLNR's rules defeats the purposes of underlying shoreline laws and creates the backwards result of reducing shoreline protections where the waves push the debris line mauka of the vegetation line. It allows development to proceed too close to the ocean, at risk from the waves and the naturally shifting shoreline. Moreover, it encourages landowners and developers to seek to expand their property by artificially extending the vegetation line seaward. This causes a host of distinct and significant harms to Hawai'i's precious beach resources and their continued use and access by plaintiffs and the public.

28. First, development too close to the ocean in disregard of debris lines causes beach erosion by encouraging and necessitating the hardening of the shoreline through vegetation or structures, which interferes with the natural movement of the beach. Such erosion impairs the many recreational, aesthetic, conservationist, cultural, and other uses of shoreline areas by members of plaintiffs and the public. Beach loss is a pervasive problem across the state, with tremendous impacts on the society, culture, and economy of Hawai'i, and the recognized leading cause is development too close to the ocean. According to coastal geologists, one-fourth of Oahu's beaches and one-third of Maui's beaches have been lost due to coastal hardening.

29. Moreover, the undue emphasis on vegetation in the BLNR's rules diminishes public access of shoreline areas. This occurs not only from loss of beach via erosion as described above, but also from the physical encroachment on public beaches by private development. Improper shorelines based on vegetation lines often allow houses or yards and gardens to occupy what should be public beaches. Private landowners treat land mauka of the shoreline as their property and all too often attempt to expand this area and block public access by extending the vegetation line further makai with vegetation artificially induced with plantings, soil, mulch, and fertilizer, and irrigation.

30. The undue emphasis on vegetation in the BLNR's rules also endangers public health and safety. Development too close to the ocean in disregard of mauka debris lines creates needless hazards to landowners and their property, the burdens of which shift to the public in the form of flood relief and insurance costs and loss of beach

due to shoreline hardening. The narrow definition of public beach based on vegetation lines also creates hazards for members of plaintiffs and the public, who are forced to confine their uses and access of the shore to a constricted and steadily shrinking beach area often overrun by surf.

31. In sum, the undue emphasis on the vegetation line mandated in the BLNR's administrative rules harms the entire range of interests of plaintiffs and the public that the underlying shoreline laws seek to protect, including natural resource protection, public access, and public health and safety. With hundreds of shorelines being certified yearly with minimal public oversight, leading shoreline experts and advocates in Hawai'i have identified such "administrative erosion" of the shoreline through improper shoreline certifications as one of the most critical threats to beach resources and access in Hawai'i today.

#### CLAIM FOR RELIEF

32. Plaintiffs reallege and incorporate by reference the allegations in the preceding paragraphs.

33. The definition of "shoreline" under § 13-222-2 of the Hawai'i Administrative Rules is invalid, violates constitutional and statutory authority, and exceeds the statutory authority of the BLNR to the extent that it sets a blanket preference for the vegetation line over the debris line in the determination of the shoreline, contrary to the well-settled precedent of the Hawai'i Supreme Court, the public trust doctrine, and the letter and purpose of the underlying statute, and with the



backwards result of weakening shoreline protection and reducing public access where the debris line lies further mauka of the vegetation line.

34. Plaintiffs' interests in continued use and enjoyment of, and access to, beach resources in their communities and throughout this state have been, and will continue to be, adversely affected by the invalid definition of the "shoreline" in Haw. Admin. R. § 13-222-2. Plaintiffs are therefore entitled under Haw. Rev. Stat. § 91-7 to a judicial declaration holding the rule's definition invalid to the extent that it establishes a preference for the vegetation line over the debris line where the debris line extends mauka of the vegetation line.

#### PRAYER FOR RELIEF

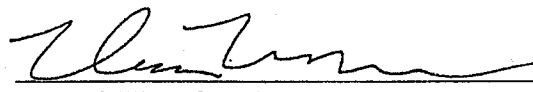
WHEREFORE, plaintiffs respectfully request this Court:

1. For a declaratory judgment entered in favor of plaintiffs and against defendants ruling that the definition of "shoreline" in Haw. Admin. R. § 13-222-2 is invalid to the extent that it establishes this blanket preference for the vegetation line and requires or allows defendants to disregard debris lines further mauka of the vegetation line, instead of extending the public beach as far as the mauka debris lines.
2. For an award of the costs of suit herein, including an award of reasonable attorneys' fees.
3. For such further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between plaintiffs and defendants.

DATED: Honolulu, Hawai'i, July 25, 2005.

PAUL H. ACHITOFF  
ISAAC H. MORIWAKE  
D. KAPUA'ALA SPROAT  
EARTHJUSTICE  
223 South King Street, Suite 400  
Honolulu, Hawai'i 96813-4501

By:

A handwritten signature in dark ink, appearing to read 'Isaac Moriwake', written over a horizontal line.

ISAAC H. MORIWAKE  
Attorney for Plaintiffs

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawaii**

November 18, 2005

**Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawaii**

**REGARDING:** Request for Public Hearing and Small Business Impact Determination: Petition to Amend Title 13, Chapter 5, Hawaii Administrative Rules (13-5, HAR) to Designate a Portion of the State Land Use Conservation District into the Resource Subzone

**PETITIONER:** Kimura International, Inc. for  
County of Kauai

**LANDOWNER:** County of Kauai

**LOCATION:** Kealia, Island of Kauai

**TMKs:** (4) 4-7-007:029

**AREA OF PARCEL/** 59.101 Acres

**PETITION AREA:** Approximately 44 acres

**SUBZONE:** Undesignated

**BACKGROUND**

On March 25, 2004, the Board of Land and Natural Resources approved Conservation District Use Permit (CDUP) KA-3160 for the Kealia-Kapaa Bike and Pedestrian Pathway. Condition #19 states: *The area south of Paliku Point up to Ahihi Point is an undesignated subzone; once the subzone has been designated, the applicant can implement the changes proposed in the CDUA.* The County of Kauai is requesting a rule amendment to change the undesignated subzone to the Resource subzone in compliance with Condition #19 of CDUP KA-3160.

**BOARD OF LAND AND  
NATURAL RESOURCES**

**DESCRIPTION OF AREA AND CURRENT USE**

The subject area is located within the Kealia ahupua'a and is referred to as the "Kealia Kai Subdivision Section." The area is rural and undeveloped. The undesignated subzone stretches about 1,000 feet along the coastline between Paliku Point and Ahihi Point, and varies from 150 feet to over 400 feet in width. The undesignated subzone is located directly makai of the Kealia Kai subdivision and includes Kuna Bay (**Exhibit 1**).

Existing Land Use Classifications

The subject parcel is newly created and includes lands that were dedicated to the County of Kauai by a private landowner. The dedication of land is approximately 59.10 acres and lies within the Limited and undesignated subzones of the Conservation District. The undesignated area had formerly been within the Agricultural State Land Use District. Pursuant to Land Use Commission Docket No. BR94-715, the Office of State Planning, with the consensus of then landowner, petitioned the State Land Use Commission (LUC) to reclassify the subject area into the Conservation District. The subject area was redesignated on July 20, 1995. (**Exhibit 2 & 3**).

Geographic Characteristics

The sandy beach at Kuna Bay, known as Donkey Beach, slopes gradually mauka toward the Kealia Kai subdivision. Mauka of the sandy beach, the terrain becomes a rocky bank as it slopes upward toward the existing cane haul road. At the top of the slope near the cane haul road, the topography opens up with less steep grades associated with surrounding properties. The southern and the northern ends of the undesignated subzone area, near Paliku Point and Ahihi Point, are characterized by basalt boulder and cobble beaches (**Exhibit 4 & 5**).

The shoreline fronting the Kealia Kai Subdivision is characterized by basalt boulder and cobble beaches, and backed by steeply sloping dirt and rocky banks. There is no fringing reef offshore. There is a section of this shoreline about 600 to 700 feet long that is an area subject to coastal erosion.

Along the southern half, there is a basalt shelf that extends 100 to 150 feet seaward of the shoreline. This shelf causes waves to break along its seaward edge, and thus shelters the shoreline from wave effects. At the base of the bank, a basalt boulder and cobble beach extends to the basalt shelf at the waterline. Most of this reach is well vegetated which is evidence that it is relatively stable and well protected by the basalt shelf and boulder beach. The edge of the cane haul road has been eroded in a few locations which appear to be due mostly to surface runoff from inland areas.

The northern half of this section shows evidence of wave erosion. There is no basalt shelf, and waves break closer to shore. A basalt boulder and cobble beach extends from the base of the bank at an elevation of about 11 feet to a basalt rock outcrop extending into the water at an elevation of about 4 feet msl. There is no vegetation on the bank

**BOARD OF LAND AND  
NATURAL RESOURCES**

along this reach, indicating that it is not as stable and may be directly impacted by large waves.

Climatic Characteristics

The climate in this area is warm with moderate rainfall and similar to that of the Lihue area. The average annual daily temperature recorded in Lihue ranged between 71 and 80 degrees Fahrenheit in the year 2000 with an average annual temperature of 76 degrees. The average annual rainfall recorded at the Lihue and Moloaa stations (south and north of the subject area) are about 43 and 51 inches, respectively. The predominate surface wind is the prevailing trade winds from the northeast dominate from April to November. Winds from the south are infrequent occurring only a few days a year and mostly in the winter associated with "Kona" storms. Wind speeds are predominantly in the 13 to 24 miles per hour range.

Hydrological Characteristics

Homaikawa'a Stream is located just south of Ahihi Point, within the subject area. While conducting a survey of the subject area for the Environmental Assessment, the stream consisted of a dry gulch leading to an estuarine pool. Runoff flows through the gulch into the ocean only during storm events.

According to the Flood Insurance Rate Maps (FIRM), the subject undesignated subzone area is not located within a floodplain. However, it is located in zone VE, an area subject to coastal flood with velocity hazard (wave action). Base flood elevations in the area vary between 20 and 21 feet.

Biological Characteristics

The flora vegetation in this area is classified as Coastal Dry Shrub land, consisting of scattered herbs, grasses, vines, shrubs and trees that are mostly indigenous to Hawaii. The most common vegetation includes Beach morning glory or pohuehue, pa'u o hi'iaka, alena, naupaka, akulikuli, pohinahina, ilima and akiaki grass. According to the Final Environmental Assessment done for the Kapa'a-Kealia Bike/Pedestrian Path Proposal, no proposed or listed threatened or endangered botanical species were observed in the subject area.

Avifaunal and feral mammal surveys identified the presence of the endangered Hawaiian Hoary bat and an endangered Hawaiian monk seal hauled out on the beach north of Paliku Point in the subject area. Domestic dogs, evidence of cats and horses were noted.

An avian survey conducted for the Bike/Pedestrian Path noted that the majority of bird species along the project corridor were alien species. Listed seabird species such as the dark-rumped petrel and the threatened Newell's shearwater are known to cross the Kauai coastline in relatively large numbers during breeding season. Avian diversity and densities along the study corridor was described as low.

**BOARD OF LAND AND  
NATURAL RESOURCES**

Historic Sites

The archaeological inventory survey and a traditional and cultural practice assessment conducted in 2002 were reviewed and approved by the State Historic Preservation Division. Six historic properties were identified, a military platform and foxhole from World War II, a ditch, retaining wall and wall with a probable age from 1890's to the present and native Hawaiian burials.

Burials at Kuna Bay have been reported by other archaeological studies, and were the subject of a Burial Treatment Plan reviewed and approved by the Kauai/Niihau Island Burial Council and the State Historic Preservation Division.

Scenic & Visual Resources

The subject area's coastline has been identified as an important scenic resource in the Kauai General Plan. Development in the adjacent Agricultural area shall change the view plane from Kuhio Highway.

Infrastructure Evaluations

According to the petitioner, a rest pavilion may be sited within the subject area. The rest pavilion will be an open sided, covered structure, with a concrete slab floor, approximately 400 square feet in size. A paved pathway will lead from the Bike/Pedestrian Path makai to the rest pavilion. Future extensions of the path may include other accessory uses such as picnic shelters and a comfort station.

**REVIEW OF PROPERTY CHARACTERISTICS IN RELATION TO SUBZONE OBJECTIVES**

The objective of the resource subzone is to develop, with proper management, areas to ensure sustained use of the natural resources of those areas. In the future, regarding this particular area, this would encompass lands necessary for providing future parklands, lands suitable for outdoor recreational uses such as hunting, fishing, hiking, camping, and picnicking and lands and state marine waters seaward of the upper reaches of the wash of waves.

The applicant proposes to construct a rest pavilion for recreational use that is an accessory to the path improvements for the Kapaa to Kealia Bike and Pedestrian Path in the subject area. In addition, the applicant shall implement the approved Burial Treatment Plan to protect an existing burial area from vehicles and pedestrians. Proposed improvements in the Conservation District will be very low intensity, and will not alter natural conditions.

**BOARD OF LAND AND  
NATURAL RESOURCES**

**ALTERNATIVES CONSIDERED**

The only alternatives possible are to designate the subject parcel within another subzone of the Conservation District. Staff notes the undesignated Conservation District has Limited subzone lands to the north and to the south. The subject area is in conformity with the objectives for the Limited subzone. It contains lands susceptible to erosion, tsunami and is located in zone VE, an area subject to coastal flood with velocity hazard (wave action). Staff believes that the area is more suitable for a Limited subzone designation. However, Public Hearings should be held to collect public comment prior to any Staff recommendation being made.

**STAFF ANALYSIS:**

Petitions to amend the administrative rules are reviewed by the Legislative Reference Bureau and the Department of the Attorney General. With Board approval the proposed rule change will be submitted to those agencies for review. In order to take effect, proposed rule amendments must obtain Land Board and gubernatorial authorization for both public hearing and final approval.

Authorization for Public Hearing:

The first major step to amend the administrative rules is to hold a public hearing. The request for public hearing is the subject of this staff submittal. Should the Board of Land and Natural Resources (Board) approve the subject request, the department would forward the request for public hearing to the Governor for approval. At the Board's discretion, the Board may modify the proposed rule change at this time.

Approval/Disapproval:

After public hearing, the second major step would be to seek the Board's discretion to forward the proposed rule change to the Governor for approval. The Board may also modify the proposed rule change at that time. Both the Legislative Reference Bureau and the Department of the Attorney General would review, and the Department of the Attorney General approve as to form, the proposed rule change prior to forwarding the proposed rule change to the Governor for decision.

State Policies and Procedures:

The Governor of the State of Hawaii has issued Administrative Directive No. 99-02 to guide policy and procedures for the adoption, amendment or repeal of administrative rules. The Governor directs that petitions for administrative rule changes address certain policy topic areas. By this submittal, staff proposes that the general content of this petition be transmitted to the Governor's office along with any approved request for public hearing.

**BOARD OF LAND AND  
NATURAL RESOURCES**

Chapter 343, HRS, Requirements:

In conformance with Title 11, Chapter 200, Hawaii Administrative Rules and Chapter 343 Hawaii Revised Statutes, an Environmental Assessment and a Conservation District Use Permit (CDUP) has been approved for the Kapaa-Kealia Bike and Pedestrian Pathway. The County of Kauai is requesting a rule amendment to change the undesignated subzone to the Resource subzone in compliance with Condition #19 of CDUP KA-3160.

**STAFF RECOMMENDATION:**

That the Board of Land and Natural Resources:

1. Approve the petitioner's request to process the subject petition to amend Chapter 13-5, Hawaii Administrative Rules;
2. Determine that the proposed rule amendment will not impact or affect small business;
3. Authorize the forwarding of a request for public hearing to the Governor, State of Hawaii, on the proposed rule amendment;
4. Upon executive approval, publish public hearing notice; and
5. Upon executive approval, appoint a representative of the Board of Land and Natural Resources as public hearing master for the proposed rule amendment's public hearing.

Respectfully submitted,



K. Tiger Mills, Staff Planner  
Office of Conservation and Coastal Lands

Approved for Submittal:



**PETER T. YOUNG**, Chairperson  
Board of Land and Natural Resources



Kapa'a-Kealia Bike/Pedestrian Path

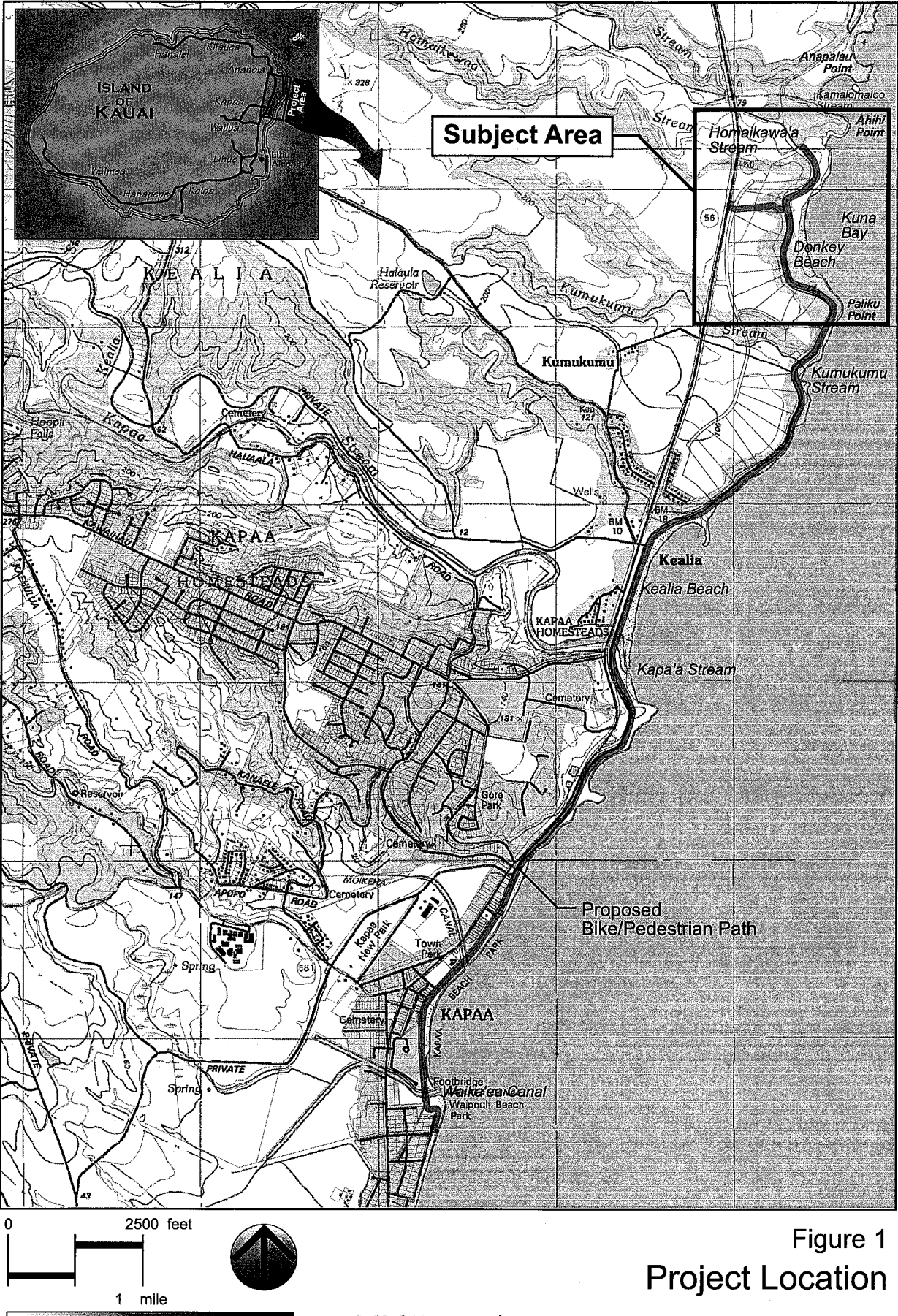
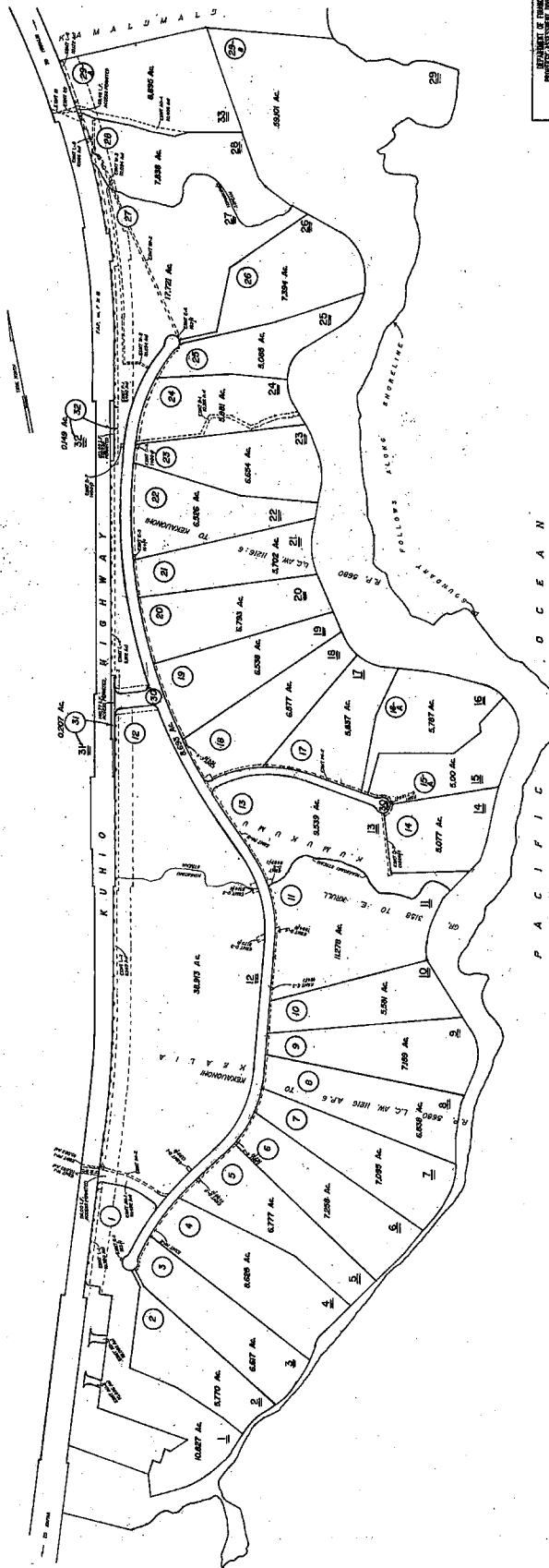


Figure 1  
Project Location

EXHIBIT I

# EXHIBIT 2



RECORD OF DEEDS PROPERTY TAX MAP STATE OF HAWAII 111 MAP			
COUNTY OF KAUAI	SECTION	PLAT	
4	7	07	
SCALE 1" = 300'			

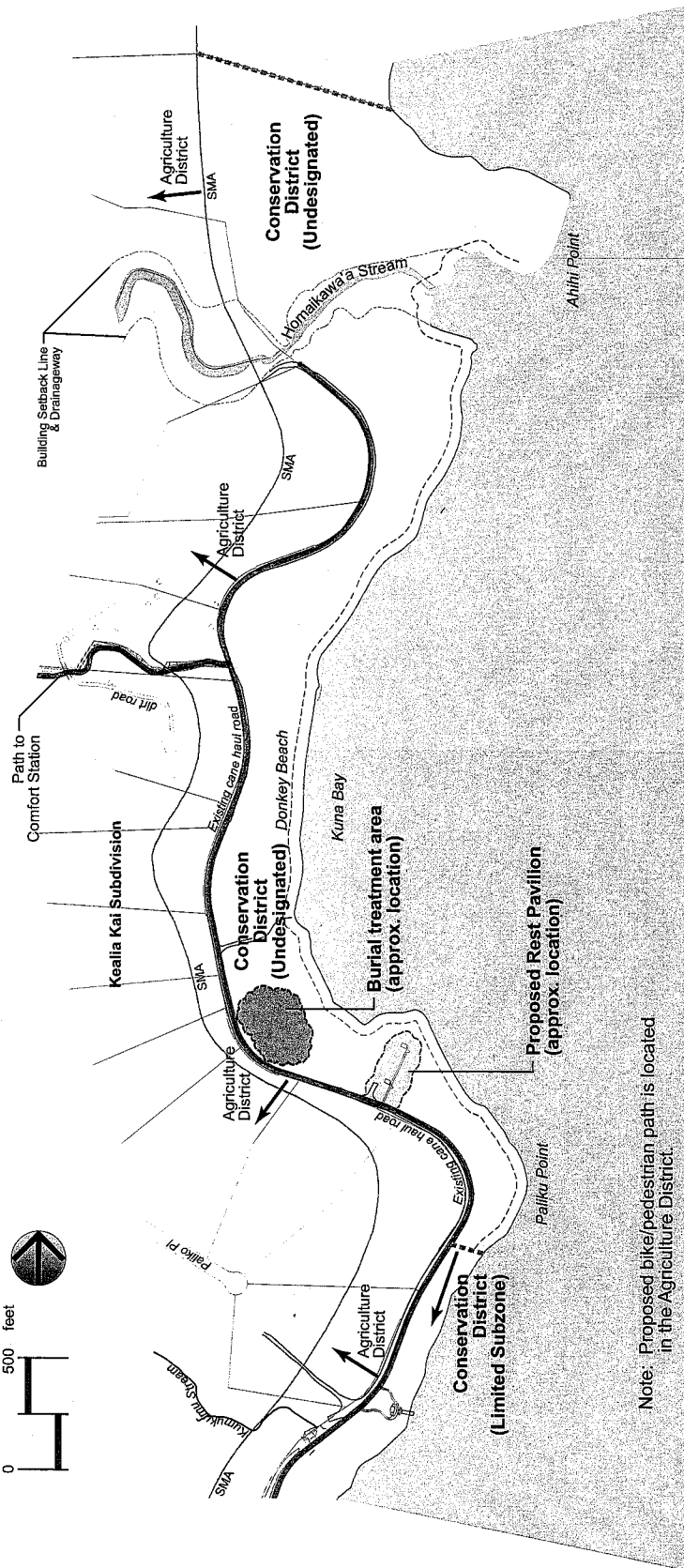
Notes: Areas & numbers shown are approximate and may vary slightly from title to title. Please refer to original map for details.

FOR PROPERTY ASSESSMENT PURPOSES - SUBJECT TO CHANGE

POR. R.P. 5680 L.C.A.W. 112166 GR. 3558 KEALIA - KANALOMALO KAHIRUALLI KALU

PRINTED

- Proposed Bike/Pedestrian Path & Equestrian Trail
- Undesignated Subzone
- Limits of Undesignated Subzone
- Special Management Area (SMA)
- Shoreline Setback (40')

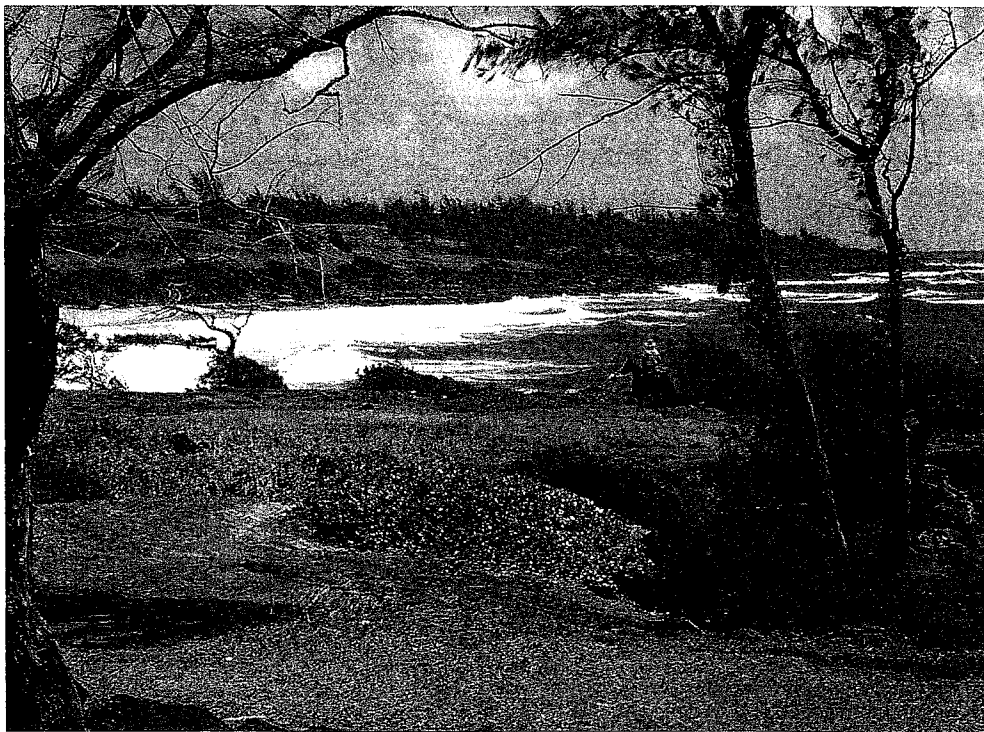


Note: Proposed bike/pedestrian path is located in the Agriculture District.

Conservation District Undesignated Subzone



Kuna Bay, looking south toward Paliku Point



Kuna Bay, looking north toward Ahihi Point.

## EXHIBIT 4



The beach (Donkey Beach) at Kuna Bay

**Kapa'a to Keālia Bike & Pedestrian Path  
Application for Conservation Subzone Designation**



Sloping, rocky topography between Donkey Beach and the existing cane haul road (looking south)

**EXHIBIT 5**

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawaii**

November 18, 2005

**Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawaii**

**REGARDING:** Amendment to Condition #6 of Conservation District Use Permit  
KA-3160

**AGENT:** Kimura International, Inc.

**LANDOWNER:** County of Kauai

**LOCATION:** Wailua, Kapaa, Kealia, and Anahola, Island of Kauai

**TMK:** 4-7-003:001 and 4-7-007:029

**AREA OF USE:** Approximately 1.49 Miles

**SUBZONE:** Limited and Undesignated

**BACKGROUND:**

On March 25, 2004, the Board of Land and Natural Resources approved Conservation District Use Permit (CDUP) KA-3160 for the Kealia-Kapaa Bike and Pedestrian Pathway subject to 21 conditions. **(EXHIBIT 1)**

**DISCUSSION**

Condition # 6 of CDUP KA-3160 states: *The applicant shall provide documentation (i.e. book/page document number) that this approval has been placed in recordable form as a part of the deed instrument, prior to submission for approval of subsequent construction plans.*

Pursuant to §13-5-42 of the Hawaii Administrative Rules, this is a standard condition. However because the County of Kauai owns the subject property, it is highly unlikely that the subject lands will be transferred. Staff believes because a government entity

owns the subject property, this condition is unnecessary and should not have been included as part of the permit conditions. This condition may hinder and add cost to the project that is a land use undertaken by the County of Kauai for public benefit and in accordance with public policy and the purpose of the conservation district.

**RECOMMENDATION:**

That the Board of Land and Natural Resources APPROVE an amendment to remove condition #6 from CDUP KA-3160 subject to the following conditions:

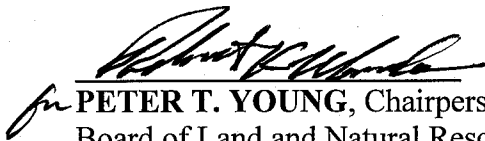
1. That all other conditions imposed by the Board under Conservation District Use Permit KA-3160, as amended, shall remain in effect.

Respectfully submitted,



K. Tiger Mills, Staff Planner  
Office of Conservation and Coastal Lands

Approved for submittal:



PETER T. YOUNG, Chairperson  
Board of Land and Natural Resources



LINDA LINGLE  
GOVERNOR OF HAWAII

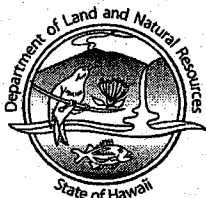


PETER T. YOUNG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

DAN DAVIDSON  
DEPUTY DIRECTOR - LAND

ERNEST Y.W. LAU  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**OFFICE OF CONSERVATION AND COASTAL LANDS**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

REF:OCCL:DH

File: CDUA KA-3160

Acceptance Date: October 24, 2003  
180-Day Expiration Date: April 21, 2004

APR - 1 2004

Mr. Ronald A. Sato, AICP  
Senior Project Manager  
SSFM International, Inc.  
501 Sumner Street, Suite 502  
Honolulu, Hawaii 96817

Dear Mr. Sato,

**SUBJECT: Conservation District Use Permit (CDUP) KA-3160 Proposed Kapaa-Kealia Bike and Pedestrian Pathway Project**

This letter is to inform you that Conservation District Use Application (CDUA) KA-3160 has been approved by the Board of Land and Natural Resources on March 25, 2004 regarding the construction of the proposed Kapaa- Kealia Bike and Pedestrian Pathway Project, and was subject to the following terms and conditions:

- 1) The applicant shall comply with all applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State and County governments;
- 2) The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;
- 3) The applicant shall comply with all applicable Department of Health administrative rules. Particular attention should be paid to Hawaii Administrative Rules (HAR) Section 11-60.1-33, "Fugitive Dust" and to Chapter 11-46, "Community Noise Control;"
- 4) Any work done on the land shall be initiated within one year of the approval of such use, and unless otherwise authorized be completed within three years of the approval. The applicant shall notify the Department in writing when construction activity is initiated and when it is completed;



- 5) Before proceeding with any work authorized by the Board, the applicant shall submit four (4) copies of the construction and grading plans and specifications to the Chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three (3) of the copies will be returned to the applicant. Plan approval by the Chairperson does not constitute approval required from other agencies;
- 6) The applicant shall provide documentation (i.e. book/page document number) that this approval has been placed in recordable form as a part of the deed instrument, prior to submission for approval of subsequent construction plans;
- 7) In issuing this permit, the Department has relied on the information and data that the applicant has provided in connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;
- 8) The applicant shall plan to minimize the amount of dust generating materials and activities. Material transfer points and on-site vehicular traffic routes shall be centralized. Dusty equipment shall be located in areas of least impact. In addition to dust control during construction, dust control measures shall be provided during weekends, after hours and prior to daily start-up of project activities. Dust from debris being hauled away from the project site shall be controlled. Landscaping and dust control of cleared areas will be initiated promptly;
- 9) The applicant understands and agrees that this permit does not convey any vested rights or exclusive privilege;
- 10) Where any polluted run-off, interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the polluted run-off, interference, nuisance, harm, or hazard;
- 11) The applicant acknowledges that the approved work shall not hamper, impede or otherwise limit the exercise of traditional, customary or religious practices in the immediate area, to the extent such practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law;
- 12) During construction, appropriate mitigation measures shall be implemented to minimize impacts to the marine environment, off-site roadways, utilities, and public facilities;

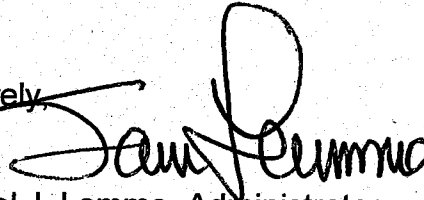
- 13) The CDUA does not give the applicant privilege to construct and/or rebuild any shoreline hardening structures (seawalls, revetments), located in the Kapaa Town Section, Kealia Beach Section, and Kealia Kai Subdivision Section;
- 14) The following HPD conditions will be added: 1) all mitigation plans should be submitted for review and approval (the required mitigation plans include the architectural data recovery work needed for the bridges); 2) Burial Council and HPD approval will be required for the one associated burial (2074A and cultural deposit 2074); if the site is impacted by construction archeological data recovery work will need to be carried out, and an acceptable archeological data recovery plan is required; 3) a burial treatment plan needs to be submitted to the Kauai Island Burial Council treatment of other burials and further inadvertent findings; 4) archeological monitoring is needed in the sandy deposit areas; 5) a preservation/interpretative plan is required (for interpretive signage and buffers); and 6) submit plans for the Paliku Burial Preserve.
- 15) If additional/undescribed construction, or landscape modifications near the streams or shorelines are developed during the design process; plans will be submitted to the department for review.
- 16) Prior to construction, the applicant shall submit final construction and grading plans to the Office of Conservation and Coastal Lands for approval;
- 17) The applicant shall locate the proposed pathway as far mauka as possible to avoid potential erosion hazards; the pathway and improvements should be located mauka of 40-foot shoreline setback wherever possible. The applicant shall consider: 1) excavating and grading the bluff to relocate the pathway mauka of the setback; 2) building the pathway on supported pilings to reduce the potential for failure due to undermining of the slab; and 3) use recycled plastic, or paving stones for the pathway to minimize non-point source pollution to the coastal system, and allow for ease of relocation should erosion become a problem;
- 18) When the option of relocating the proposed pathway as far mauka of the 40 foot setback is not possible, improvements should be constructed of a non-permanent material that is readily disassembled and relocated such as wood, recycled plastic, paving stones or other low-impact materials; permanent slab on grade construction should not be used in the areas prone to erosion.
- 19) The area south of Paliku Point up to Ahihi Point is an undesignated subzone; once the subzone has been designated, the applicant can implement the changes proposed in the CDUA:
- 20) Other terms and conditions as may be prescribed by the Chairperson; and

- 21) Failure to comply with any of these conditions shall render this Conservation District Use Permit null and void.

Please acknowledge receipt of this permit and acceptance of the above conditions by signing in the space provided below and returning a copy to the Office of Conservation and Coastal Lands within thirty (30) days.

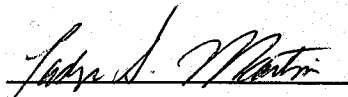
If you have any questions regarding this matter please contact Dawn Hegger of our Office of Conservation and Coastal Lands staff at 587-0380.

Sincerely,



Samuel J. Lemmo, Administrator  
Office of Conservation and Coastal Lands

Receipt acknowledged:



Date:

4/5/04

Cc: Kauai District Land Agent  
Kauai Branch Historic Preservation Division  
Kauai County  
Department of Planning  
Department of Public Works  
Department of Health